RIGHTS OF THE PUGET SOUND INDIANS TO GAME AND FISH*

The Indian of Puget Sound stands unique in Indian history. Ever and always has he supported and subsisted himself. Never has he been supported or subsisted either by the Federal Government or by the State Government. There is a common misapprehension that the Government feeds, clothes and maintains him but that is a mistake. The Government does none of these things and has never done any of them. The Indian has supported and maintained himself. No Indian has given more to the white man—no Indian has received less. Even during the Indian War the Indians of the Tulalip Agency were the friends and allies of the Government and maintained, under Pat Kanim, a band of eighty friendly Indian scouts cooperating with the military forces of the United States Government.

The treaty of Point Elliott was made by Governor Isaac Ingalls Stevens at Mukilteo or Point Elliott, Washington, January 22nd, 1855 (12 Stats., 927.) This treaty established the Tulalip Agency and its reservations—Tulalip, Lummi, Swinomish and Port Madison (or "Old Man House.")

By this treaty the Indians of Tulalip Agency ceded to the white man all of the land lying between the summit of the Cascades, the western shore of Puget Sound, Point Pully or Three-Tree Point, and the international boundary line. This area includes all the land lying in the *counties of Snohomish, Skagit, Whatcom, Island, San Juan, most of King and a part of Kitsap*—the very choicest and most valuable portion of the State of Washington, including the cities of Seattle (named after one of our old Indian chiefs), Everett and Bellingham—in fact all of the many cities and towns on the east side and some on the west side of Puget Sound north of Tacoma. That is to say, the Indians of this agency have donated to the white man all of the great townsites of Puget Sound, Tacoma and Olympia alone excepted. No Indian has given more—no Indian has received less!

Under Tulalip are direct descendants of old Chief Seattle, Chief Pat Kanim, Chow-its-hoot, Goliah and other well-known chiefs, who were among the original signers of the Tulalip Treaty. Chief Seattle is buried in our cemetery at Port Madison and Chief Pat Kanim is buried in our cemetery at Tulalip. Many Tulalip school children and their parents are the living representatives of the ancient Indian donors who gave an

*Address sent to the Washington Legislative Session of 1915, by Dr. Charles M. Buchanan, United States Indian Agent at Tulalip, Washington.

almost priceless gift to their white neighbors, against whom they have never raised their hands in war or bloodshed. The hostile Indians were of other tribes and treaties.

The Indians of Puget Sound were a self-supporting people because they were and are a fisher folk, subsisting on the bounty of the sea and the game of both sea and shore. Long before the advent of the white man to this vicinity these Indians maintained valuable fishery locations and depended thereupon for their "daily bread." When the white man came they made no attempt to dispossess the Indian from his natural resources—on the contrary they affirmed these resources to the Indian by solemn treaty pledges. Since the days of more serious settlement, however, these locations have become the causes of endless disputes and endless attempts to dispossess the Indian by legal technicalities and quibbles. Some of the old people for years maintained the firm faith and belief that: "The Great Spirit gave these things to us and no man can take them from us!"

Naturally and inevitably the aborigines inhabiting the littoral are largely dependent upon the bounty of the sea for support and therefore become a fisher folk—as happened in this case. For this reason the United States Government found these people a self-supporting people and they have since so remained. Never have they been fed, supported or subsisted by either Federal or State Government—a position unique in Indian history. The natives' natural larders have been chiefly the shellfish and fishery locations adjacent to the mouths of the great rivers of this vicinity. These resources have been sufficient to subsist and maintain our Indian people hitherto. These resources have naturally lessened with the advent of the white man; more recently, the use of large capital, mechanical assistance, numerous great traps, canneries, etc., and other activities allied to the fishery industry, have greatly lessened and depleted the Indians' natural sources of food supply. In addition thereto the stringent and harsh application to Indians of the State game and fish laws have made it still and increasingly precarious for him to procure his natural foods in his natural way. Much of this has been done under color of law. An empty larder, however, is an empty larder. The pinch of poverty and hunger are none the less severe because the man who has taken your means of subsistence has done so under cover of law and the appearance of legal right. The Indian is aware of no defect, default or transgression on his part—*ergo,* he argues, it must be that that transgression is upon the part of the white man—*post hoc propter hoc.* One by one his richer and remoter fishery locations have been stripped from him while the law held him helpless and resourceless. Driven back to his reservation by the discriminatory operation of the white man's game and fishery laws

(which may apprehend an Indian seeking a duck for dinner for his family), he is compelled to utilize the fishery locations immediately adjacent to his reservation. Now the aggressive whites are seeking even these and driving him (still under cover of law, perhaps, but none the less certainly) from these. The fishery rights adjacent to the Lummi littoral have been held in common by the Lummis from ancient times, and it is from these that the white man is now seeking to oust him. To this he naturally objects for several reasons, (1) it deprives or seeks to deprive him of a natural right, (2) it deprives him of his ancient and natural food and food supplies and his treaty rights relative thereto, and (3) even the aboriginal fisherman cannot fish on shore, on land. The Lummi Indians therefore, as a body, protest vehemently against the encroachments of whites upon their ancient fisheries immediately adjacent to their reservation regardless of such rights as the *white man may have given himself* in the premises.

If the white man takes from the Indian the latter's natural means of support the white man is in honor and in equity bound to supply the Indian with other and immediate means of support. It is neither a full nor a direct answer to this question to state that it all comes about by the operation of great natural laws, such as the survival of the fittest, etc. It has come about by the operation of laws which the white man himself has made for the white man's benefit. The Indian has never been given any power to make laws either for himself or for others.

The executive order establishing the reservation of Tulalip Agency stipulates low water mark as the shore boundary line. Beyond that the Indian is in the jurisdiction of the State, technically, and yet it is beyond that that he must go to secure his fish or his ducks, the natural food upon which he lives and has always lived, and which the treaty guarantees to him. The State issues fishing licenses and under the protection and permission thereof the white licentiate may approach the immediate littoral of the reservation and occupy in this manner the ancient fisheries of the Indians immediately adjacent to their reservations—*and to the exclusion of the Indian therefrom.* Is this "*in common*"? Where then is the Indian to fish—in his forest? Is it after all to be a case of

"Mother, may I go out to swim?"
"Yes, my darling daughter.
Hang your clothes on a hickory limb
But don't go near the water."

When the treaty was made our Indians called to the attention of the white treaty makers that the Indian's interests lay in the water as much as, if not more than, on land. He expected the treaty to take care of his interests in that respect and he believed and still believes that it has done

so. Article 5 of the Treaty of Muckl-te-oh or Point Elliott (12 Stat., 927) provides as follows:

"The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however,* that they shall not take shell-fish from any beds staked or cultivated by citizens."

The Indian claims that the above article secured to him special privileges. In the Alaska Packers Association case in Judge Hanford's court (Seattle, Wash.), the judge held that the treaty guaranteed to the Indian common rights in State territory subject to the same restrictions imposed upon citizens at such point. This determination appears not to have been subsequently confirmed. In the case of Winans (U. S. vs. Winans, 198 U. S., 371), there appears to be a direct reversal of this holding.

These things all tend to show not only the struggle that is being made by the Indian for his ancient right and ancient food, but also the struggle on the part of the State to take this from him *even on his own reservation,* as is seen in the case of George and Ross at Lummi, and even more recently in the arrest of Casimir Sam (a Tulalip Reservation Indian) for shooting ducks for his own subsistence on the waters adjacent to Tulalip Reservation.

The contention has been made that the cited Article 5 of the treaty guarantees to the Indian the same privilege (including licensure, etc.) that it does to a citizen, but when it is borne in mind that the whites outnumber the Indian in this State more than 10 to 1 and when it is further borne in mind that most of the valuable fishery and hunting grounds are adjacent to if not in the Indian country, and that trap locators may apparently acquire ancient fishery locations and exclude Indians, the guarantee of equality is more apparent than real—it is shadow rather than substance. Referring to the session laws, Washington, 1909, page 143, competent attorneys contend that the requirements for licensure are qualifications of citizenship and residence that can not be met by a reservation Indian and therefore a reservation Indian is debarred from a lawful license, while citizens of the State may readily obtain them. Is this holding rights in common? There can be no doubt but that the Indian is being thereby deprived of his treaty rights. If we take from the Indian or permit to be taken from him the treaty guarantees of his natural larders, his ancient food, his ancient fisheries, then the last reliance, the last resource of the Indian is gone and we are in honor bound to furnish the Indian with that means of self-support which we have taken from him.

Until very recent years the local game wardens and the local courts

have pursued a liberal policy in administering the game and fish laws *so far as their applications to local Indians were concerned and even when those Indians might be technically guilty of violations of the letter of the law rather than its spirit.* It is admitted and recognized that this was primarily Indian country; that this environment had years ago determined the necessary modes of existence and subsistence which the inhabitant must follow; that these modes were directly and vitally dependent upon the resources of the local environment, and that the Indian was inevitably subject to these conditions. When the white man came he, too, was dependent upon the same condition and his subsequent development of the country was a development of the natural resources of the country, all of which were more or less involved in the Indian's manner and means of existence adjacent to salt water. The exploitation of the great natural resources (especially the timber and fishery resources) made increasingly precarious and difficult the Indian's maintenance and subsistence of himself—*he has always been self-supporting*, be it said to his credit. This crucial condition increases with time—it does not diminish. It bears with especial rigor upon the older Indian to whom no other way or manner of life than the old one is known or reasonably possible The Indian of Puget Sound has always lived chiefly upon fish, shellfish, ducks, berries and *ferae naturae;* his dependence upon them has not been occasional but continual and he has therefore always taken them when and where he could—not because he chose to do so but because he must do so to live. He did not do this for sport or pleasure but for daily bread, as other men work at their daily tasks that mean subsistence. All of these things appeared to have been realized, until recently, by those officials charged with the execution of the State laws pertinent thereto. Consequently the Indians were harassed by no technicalities or quibbles of abstract law where life and living were concerned and had to be concerned. But that happy condition and wise administration appear to have passed away and a new time has come in which the Indian himself is game with no closed season in his favor. It is too bad indeed that the Indian does not have the good fortune to be a migratory duck so that he might have the protection of some special legislation and be given at least a fighting chance for his life and his living, too! Of course, the Indian cannot be actually eaten, but life is as precious and as necessary to him as to a duck.

The State administration of its hunting and fishing affairs is now in the hands of its Fish Commissioner, who has shown no predilections for Indians. The county wardens are the deputies of the Fish Commissioner who is State Game Warden *ex officio*. How drastic, harsh and unjust a policy this official is pursuing may be judged by consulting some of his cases. I refer more particularly to the Judge Hardin decision in the case

where Patrick George and Dan Ross, two Indians of Lummi Indian Reservation, *fishing within the bounds of Lummi Reservation, were arrested by him and haled into court and thus subjected to the annoyance, humiliation and expense of an unnecessary defence* in addition to the valuable time which they lost from their fishery operations. In this case the Court held against Commissioner Darwin and in his anger thereat he threatened to re-arrest the same Indians and bring them into Court again and again for the same offence by virtue of arbitrary use of plenary power vested in his office. It may be judged therefrom (when attempts are made to pursue Indians on their own reservations) what drastic steps and courses may be pursued against Indians off of their reservations. Such courses destroy the former cooperation between reservation authorities and the local State authorities in these matters. This drastic and unreasonable activity is depriving our Indians (and particularly our needy old people who depend upon the hunting and skill of themselves and of their young men) of their natural food which now renders them and has always rendered them independent of Government maintenance,—self-supporting and self-subsisting. The drastic construction and application of the game and fishing laws will deprive him of much of the means that have made him independent and self-supporting. To take away those means will ultimately drive some to beggary or to theft. We rely upon the same treaty rights as obtained in the Mattson case. We think they cover. The treaty covers both fishing and hunting. These subjects are administered by the same State Officer in State territory and many, if not most, of the provisions of the State law are similar or parallel, if not identical.

The first act in this State relative to Indians fishing is found in the Session Laws, 1891, page 171, *and has never been repealed so far as I am aware.* Indeed, this same provision is now to be found in Rem. & Ball., Sec. 5207:

"Nothing in this Act shall be construed to prevent citizens of any state having a concurrent jurisdiction with this state over or upon any rivers or waters, from fishing upon such rivers or waters; *provided that this Act shall not apply to Indians.*"

Here a specific exemption is made in favor of Indians, recognizing the necessities of the case, admitting the necessity for his maintenance of himself in his old and accustomed way so far as securing his accustomed food at accustomed places and in accustomed manners is concerned. Hunting is a part and parcel of the same necessitous condition and is specifically recognized as such in the treaty. In the state the two subjects are handled and administered by the same department and official. It is believed that the same exemption in favor of Indians was intended in the matter of game, even though it is not so specificially set out as in the question of

fishing. Indeed, many persons are under the impression that such a specific exemption of the Indian exists even in the game laws (though I do not find it myself except by implication). There is a substantial public sentiment with the Indians in this matter and opposed to the game warden's action and those substantial citizens suggest that we send a representative committee of intelligent Indians to call upon the legislature and ask the legislature to make the implied exemptions as to hunting by Indians an express and specific exemption.

Last September (1913)., 10-G, the County Game Warden, Mr. White, through one of his deputies, arrested Casimir Sam, an Indian of the Tulalip Reservation, for duck shooting in waters that we claim are a portion of Tulalip Reservation (which question is now involved in our case against the Snohomish River Boom Company at present pending in the Federal Court). Casimir Sam was arrested, taken away and placed in jail in Everett to be held for trial. The deputy game garden then came upon the reservation and forcibly removed the ducks which he alleged had been killed *off the reservation*, and the deputy warden swore to this in his complaint. A change of venue (for prejudice) was secured and a jury trial demanded. The jury declined to credit or accept any of the evidence offered by the game warden or his deputies (all of which was untrue in every material point), but did accept the evidence offered by Casimir Sam that he was upon his reservation and within his rights. The jury exonerated and acquitted the Indian and repudiated the game warden. Yet this wrongful arrest of Caisimr Sam by the County Game Warden deprived the Indian of his liberty for several days, humiliated him and subjected him to the unnecessary (otherwise) expense of $50.00 for an attorney to defend him and prove his innocence—which said amount the Indians and myself raised by subscription and repaid, for Casimir had no funds. The sum was subscribed chiefly by interested Indians and myself —no outsiders were asked to contribute, though there was and is a strong local sentiment in favor of the Indian in this matter.

The Indian's equitable rights in all of these instances are strong, undoubted. But it is not upon the equities of his case that he must rest— the preponderance of conclusions of law as well as those of the findings of fact are usually with the Indian. The Superior Court of the State of Washington in and for the County of Whatcom has repeatedly so decided. The most recent of those several cases was that against Dan Ross and Patrick George (both Indians of the Lummi Indian Reservation at Tulalip Agency), for alleged unlawful fishing without a license, was tried before Judge Hardin of the aforesaid Court on October 29th, 1913. This was not a jury trial, but was heard and decided by the Judge strictly on its legal issues and merits. Judge Hardin delivered a long, written opinion

in this said case on Tuesday, November 4th, 1913. The newspapers gave extended notice to it at the time, deeming the case of much importanc—as, indeed, it was. The Judge passed upon the case from the standpoint of the treaty and also construed the provisions of the State Constitution and the Enabling Act under which Washington Territory was admitted into the sisterhood of states. The rights of the Indians, under the pledges and guarantees of their treaty as aforesaid, were featured strongly in the presentation of the case in court. Judge Hardin concluded his opinion as follows:

"If it be conceded, therefore, that the point where the defendants were fishing was *without the Reservation*, yet the ground where they were fishing at the time, *being a usual and accustomed place of fishing by the Indians at the time of the making of the treaty*, the defendants would have, by reason of article 5 of the treaty, the right, in common with white men, *to fish thereat and without license from the State.*"

There is complete recognition of both cause and effect, without quibble or equivocation. The Judge states clearly the special privileges of the Indians and clearly assigns and allocates them to the aforesaid treaty. The Judge further stated, orally, that to his mind the law was so plain that it did not admit of any controversy.

The rights of the Indians have been recognized in many ways and have been affirmed by many courts—Federal as well as State. The following citations are given as of especial interest in this connection:

U. S. vs. Winans, 198 U. S., 371.
Seufert vs. Olney, 193 Fed., 200.
U. S. vs. Taylor, 3 Wash. Ter., 88.
Harkness vs. Hyde, 98 U. S., 237.
In re Blackbird, 109 Fed., 139.
U. S. vs. Kagama, 118 U. S., 375.

Hitherto much reliance has been placed by our opponents on the Alaska Packers' Association case, heard by Judge Hanford, and in which the Judge affirmed that no special or peculiar privileges accrued to the Indians on those points by reason of the Indian treaty! The case of U. S. vs. Winans (*supra*) completely reverses Judge Hanford's holdings, however, in the aforesaid case. The Seufert vs. Olney case, the U. S. vs. Taylor case, both of them, refer to the treaty and are strong decisions. Indeed, in the U. S. vs. Taylor case, 3 Wash. Ter., 88, an injunction was granted restraining a property owner from maintaining a fence that cut off access to fishing grounds *which were some fifty or sixty miles* distant from the Reservation!

The requirements to obtain State licensure are citizenship, or a declaration of citizenship, and a residence for one year prior thereto; the

present Act has a provision that nothing in the said Act shall prevent the issuance of licenses to Indians *who possess the qualifications of citizenship and residence hereinbefore required.* How then can a reservation Indian possibly obtain a lawful license? If the conditions of the State laws make it impossible for such Indians to obtain such licenses why should the Indian be penalized therefor? Why should the Indian be punished for failing to do what the State laws makes it impossible for him to do?

Prior reference herein has been had to the fact that the first Act in this State relative to Indians fishing is found in the Session Laws of 1891, at page 171. This Act has never been repealed and is now found in Rem. & Ball., Sec. 5207. It reads as follows:

"SECTION 5207. Nothing in this Act shall be construed to prevent citizens of any state having a concurrent jurisdiction with this state over or upon any rivers or waters, from fishing upon such rivers or waters; provided that this act shall not apply to Indians."

"*Provided that this act shall not apply to Indians*"! That has not been repealed, but is it observed?

In 1909 the legislature, in the Act relative to the taking of salmon and other food fish and providing for licenses, has the following, Session Laws of 1909, page 143:

"Provided that nothing in this Act or any other Act shall prevent any person residing in this state from taking salmon or other fish by any means at any time for consumption by himself and family"!

Has that Act ever been repealed?

What, then, gentlemen, are we asking and why are we asking it? Our reasons have all preceded this portion of our statement. It only remains to state that which we most earnestly beseech of the lawgivers of our State, for we wish to be, as we have always been, law abiding and law respecting with all due respect and loyalty to duly constituted authority and properly enacted law. We ask you to make it possible for the Indian to live, to live lawfully, to live lawfully on the food and food sources which he knows and which are at his disposal, to make it possible thereby for him to live at peace and in good will with his white neighbor and ancient friend. This we ask, this we beseech of you, to rewrite into the laws of our State, to confirm again to the Indian the exemption privileges conferred upon us by the first Act in this State relative to Indians fishing (Session Laws, page 171). This has never been repealed and is now found in Rem. & Ball., Sec. 5207. Confirm to us also the privileges of the Act of 1909 found in Session Laws, 1909, page 143. Also please make the requirements precedent to licensure more explicit and less ambiguous, and since the conditions embodied in the requirements of the law make it practically impossible for reservation Indians to lawfully acquire a

lawful license, please have that fact stated explicitly beyond doubt and peradventure. In order that the laws may state clearly and explicitly their purpose and intent clearly and fully on all of these points, we ask, in the name of our ancient friendship, in the name of our present wardship and in the name of our future citizenship, that the proper and necessary amendments be made to the said laws and acts to make further quarrels, clashes and litigation both unnecessary and undesirable on these said points. We not only wish to live, we must live—it is the wish, the desire and the design of the Great Spirit that we do so, for to that end and purpose has He placed us here and watched over us. It is equally important not only that we live but that we live in peace, harmony and friendship with our white friends and the laws which they make but which we have not the privilege of making. In the name of all these things, friends and neighbors, do we ask you to open your hearts to us and in your minds to generously and kindly remember us who were your ancient friends and allies in the only Indian War that this vicinity has ever known. That is the proud history of the Indians of the Tulalip Agency, of all of the Indians signatory to the Treaty of January 22nd, 1855 (12 Stats., 927), at Muckilteo, Washington. Friends, to your friendly hearts, to your kindly intelligence and to your penerous spirits do we confidently appeal our case.

CHARLES M. BUCHANAN.